APPENDIX A

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Argued—May 21, 1991

WILLIAM C. THOMPSON, J.P.
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

90-07800
91-02056
91-02059
91-02060
91-02061

EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER

In an action, *inter alia*, for declaratory and injunctive relief challenging the constitutionality of former Tax Law § 612(c)(3) and Administrative Code of the City of New York former § 11-1712(c)(3), the defendants ap-

peal from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Le Vine, J.), dated June 14, 1990, as declared the challenged laws invalid and unconstitutional, and enjoined them from assessing or collecting personal income taxes which may still be due and owing, and from interfering with or refusing to grant the plaintiffs a refund of taxes paid on Federal pension benefits for the years 1986 through 1988, and the plaintiffs (1) cross-appeal from so much of the same order and judgment as, upon renewal, denied their motion for class certification, and dismissed the first cause of action asserted under 42 USC § 1983, and the fourth cause of action asserted against the defendant City of New York for money had and received (*Duffy v Wetzler,* 148 Misc 2d 459), and (2) appeal from four orders of the same court, all entered October 5, 1990, which denied their motions (i) for leave to renew or reargue their application for class certification and for resettlement of the judgment, (ii) to supplement their pleadings, (iii) to permit the intervention of various taxpayers, and (iv) for an award of attorneys' fees to the plaintiffs' counsel under the common fund doctrine. By opinion and order of this court dated January 15, 1992 (*Duffy v Wetzler,* 174 AD2d 253), the order and judgment appealed from was modified in certain respects by deleting, *inter alia,* those provisions which declared that the plaintiffs were entitled to refunds, and which granted injunctive relief accordingly, and the orders were affirmed. On a writ of certiorari to this court, the Supreme Court of the United States vacated the opinion and order of this court dated January 15, 1992, and remitted the matter here "for further consideration in light of *Harper v Virginia Department of Taxation,* 509 U.S. ——, 113 S. Ct. 2510, —— L. Ed. 2d —— (1993)" (*Duffy v Wetzler,* —— US ——, 113 S Ct 3027, 3028). Justice Altman has been submitted for former Justice Kunzeman (*see,* 22 NYCRR 670.1[c]).

ORDERED that the appeal from the order and judgment of the Supreme Court, Queens County, dated June

14, 1990, is dismissed, without costs or disbursements, as academic; and it is further,

ORDERED that the order and judgment is affirmed insofar as cross-appealed from, without costs or disbursements; and it is further,

ORDERED that the orders are affirmed insofar as appealed from, without costs or disbursements.

In *Duffy v Wetzler* (174 AD2d 253, *supra*) (hereinafter *Duffy I*), this court addressed the issue of whether the decision of the United States Supreme Court in *Davis v Michigan* (489 US 803) should be applied retroactively. In *Davis,* the Supreme Court of the United States invalidated, as violative of principles of intergovernmental tax immunity, Michigan's income taxation scheme which exempted from taxation pensions paid to former state employees but taxed the pensions paid to all other retirees, including those of the Federal government. The tax laws existing in this State and the City of New York at the time of the *Davis* decision were similarly discriminatory (*see,* Tax Law § 612[c][3]; Administrative Code of the City of New York § 11-1712), and were subsequently amended to exempt pensions paid to Federal retirees from taxation by the State and City (L 1989, ch. 664, §§ 1, 2, 3). The plaintiffs, Federal retirees, sought to secure refunds of the illegally imposed taxes for the period provided by statute (*see,* Tax Law § 687[a]), asserting that the *Davis* decision should be applied retroactively.

This court, in *Duffy I* (*supra,* at 259-265), reasoned that the Supreme Court's plurality decision in *James B. Beam Distilling Co. v Georgia,* (501 US ——, 111 S Ct 2439), which proscribed the use of selective prospectivity, did not preclude the application of *Davis* on a purely prospective basis. This court concluded that the appropriate analysis of the prospectivity issue was governed by *Chevron Oil v Huson* (404 US 97), and that application of the three-pronged *Chevron Oil* test required that *Davis* be given only prospective effect.

The United States Supreme Court subsequently granted the plaintiffs' petition for certiorari, vacated the opinion and order of this court in *Duffy I*, and remitted the matter here for further consideration in light of *Harper v Virginia Dept. of Taxation* (509 US ——, 113 S Ct 2510). In *Harper*, the Supreme Court ruled that its 1989 determination invalidating state laws taxing Federal pensions but not those of former state employees must be applied retroactively as a matter of Federal law. However, on the issue of remedy, the court further held that Federal due process did not necessarily mandate refunds of the illegal taxes so imposed if state law provided an adequate form of "predeprivation process", as, for example, by allowing taxpayers to bring suit to enjoin imposition of a tax prior to its payment (*Harper v Virginia Dept. of Taxation, supra,* at 2519-2520).

The State of New York decided to "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under *Davis* [and] * * * *Harper* * * * and who have filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance", and notified this court of that decision in a letter dated June 29, 1994. The City of New York has acquiesced in this decision.

Accordingly, the issues affected by the remittitur by the United States Supreme Court for further consideration in light of *Harper, i.e.*, those relating to the remedy and the potential refunds, are academic. Moreover, the plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in *Duffy I*, and need not be reexamined.

THOMPSON, J.P., MILLER, O'BRIEN and ALTMAN, JJ., concur.

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

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EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER ON MOTION

On the court's own motion, it is,

ORDERED that the decision and order on motion of this court, dated July 19, 1994, is recalled and vacated and the following decision and order on motion is substituted therefor:

Motion by Anderson Kill Olick & Oshinsky, P.C., the co-counsel of the plaintiffs, to enjoin the defendants from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for

refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phelan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, and from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund in this action.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that so much of the motion as refers to the distribution to the plaintiff clients is referred to the Supreme Court, Queens County (Le Vine, J.), for hearing and determination, and the motion is otherwise denied; and it is further,

ORDERED that the Supreme Court, Queens County, shall set the matter down for an immediate hearing, limited solely to the issue of whether the attorneys have a right to a charging lien pursuant to Judiciary Law § 475, against the refunds to be paid to the plaintiff clients and if so, the amount of the lien; and it is further,

ORDERED that pending hearing and determination of the motion, the defendants are enjoined from making any distribution to the plaintiff clients in an amount greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, provided that the attorneys submit a list of their clients' names to the Attorney-General within 5 days after service upon them of a copy of this decision and order on motion, with notice of entry.

MANGANO, P.J., THOMPSON, MILLER, O'BRIEN, and ALTMAN, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX B

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Argued—May 21, 1991

WILLIAM C. THOMPSON, J.P.
JOSEPH J. KUNZEMAN
SONDRA MILLER
CORNELIUS J. O'BRIEN, JJ.

90-07800
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91-02061

EUGENE H. DUFFY, *et al.*,
Respondents-Appellants,

ALBERT ENGEL, *et al.*,
Proposed Plaintiffs-Intervenors-Appellants,

v.

JAMES W. WETZLER, ETC., *et al.*,
Appellants-Respondents.

OPINION & ORDER

APPEALS by the defendants James W. Wetzler, Roderick G.W. Chu, and Edward V. Regan, and by the defendants Anthony Shorris, Stanley E. Grayson, Abraham Biderman, Paul Crotty, and the City of New York, in an action, *inter alia,* for declaratory and injunctive relief challenging the constitutionality of former Tax Law § 612(c)(3) and Administrative Code of the City of New York former § 11-1712(c)(3), from so much of an order and judgment (one paper) of the Supreme Court (Alan Le Vine, J.), dated June 14, 1990, and entered in Queens County, as declared the challenged laws invalid and unconstitutional, and enjoined the defendants from assessing or collecting personal income taxes which may still be due and owing, and from interfering with or refusing to grant the plaintiffs a refund of taxes paid on Federal pension benefits for the years 1986 through 1988, CROSS APPEAL by the plaintiffs from so much of the same order and judgment as, upon renewal, denied their motion for class certification, and dismissed the first cause of action asserted under 42 USC § 1983, and the fourth cause of action asserted against the defendant City of New York for money had and received (*Duffy v. Wetzler,* 148 Misc 2d 459), and APPEALS by the plaintiffs from four orders of the same court, all entered October 5, 1990, which denied their motions (i) for leave to renew or reargue their application for class certification and for resettlement of the judgment, (ii) to supplement their pleadings, (iii) to permit the intervention of various taxpayers, and (iv) for an award of attorneys' fees to plaintiffs' counsel under the common fund doctrine.

Robert Abrams, Attorney-General, Albany, N.Y. (Peter H. Schiff and Denise A. Hartman of counsel), for appellants-respondents James W. Wetzler and Roderick G.W. Chu, individually and as present or former New York State Commissioner of Taxation and Finance, and Edward V. Regan, individually and as Comptroller of the State of New York.

O. Peter Sherwood, Corporation Counsel, New York, N.Y. (Edward F.X. Hart, Stanley Buchsbaum, Frances J. Henn, and Edith I. Spivack of counsel), for appellants-respondents Anthony Shorris, Stanley E. Grayson, Abraham Biderman, and Paul Crotty, individually and as present or former Commissioner of Finance of the City of New York, and the City of New York.

Anderson Kill Olick & Oshinsky, P.C., New York, N.Y. (Rudolph W. Giuliani, Mark L. Weyman, and Roberto Velez of counsel), Phelan & Costello, P.C., New York, N.Y. (John J. Phelan III, Robert J. Costello, and Michael F. Fitzgerald of counsel), and O'Neil, Cannon & Hollman, S.C., Milwaukee, Wisconsin (Eugene O. Duffy and Gregory W. Lyons of counsel), for respondents-appellants and proposed plaintiffs-intervenors-respondents-appellants. (one brief filed)

THOMPSON, J. P.

The main issue arising at bar is whether the decision in the instant case should be applied retroactively, or prospectively, pursuant to the recent decision of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia* (—— US ——, 111 S Ct 2439 [hereinafter Beam]). We conclude that an analysis of *Beam* requires prospective application on the facts. For the reasons which follow therefore, we modify the order and judgment from which the first appeal ensues, and affirm the orders appealed from.

I

The plaintiffs commenced this action on May 9, 1989, on behalf of themselves and purportedly all Federal retirees similarly situated, seeking a declaratory judgment, a permanent injunction, and damages as a result of the United States Supreme Court decision on March 28, 1989, in *Davis v Michigan Department of Treasury* (489 US 803 [hereinafter *Davis*]). In that case the Supreme Court invalidated, as unconstitutional, Michigan's tax

scheme which exempted from taxation pensions paid to former State employees but taxed the pensions paid to all other retirees, including those of the Federal government. *Davis' ratio decidendi* was predicated on a construction of 4 USC § 111, which provides, in pertinent part, that the Federal government consents to the taxation of its officers or employees "by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate against the officer or employee because of the source of pay or compensation*" (emphasis added). The *Davis* court held that 4 USC § 111 applied to both retirement and ordinary income, and it found discrimination, and a violation of the principles of intergovernmental tax immunity in Michigan's exemption of State retiree pensions. While it will be more relevant later, it bears noting at this juncture that *Davis* never *decided* the point regarding prospectivity or retroactivity, and therefore made no determination as to refunds of those taxes which had been unconstitutionally assessed and collected.

Interestingly enough, at the time of the *Davis* decision, at least 19 states, including New York, had tax or pension statutes that included exemptions similar to Michigan's. Not surprisingly, *Davis* spawned a mass of litigation in many states on behalf of Federal retirees seeking, as do the plaintiffs at bar, an adjudication of the constitutionality of such statutes and/or refunds of taxes paid.

In 1920, both the Greater New York Charter and the New York Civil Service Law were amended to render exempt from State and municipal taxes the pensions of officers and employees of the State and City (*see*, L 1920, ch 427, ch 741). In 1939, a similar provision was incorporated into the New York Constitution as article XVI, § 5 which provides that "[a]ll salaries, wages and other compensation, *except pensions*, paid to officers and employees of the State and its subdivisions and agencies shall be subject to taxation" (emphasis added). This provision was also legislated into Tax Law § 612(c)(3), one of the statutes at issue, "subtract[ing] from federal

adjusted gross income * * * [p]ensions to officers and employees of this State." Also in 1939, in response to *Graves v People ex rel. O'Keefe* (306 US 466) and the Public Salary Tax Act of that year (4 USC § 111), New York first began to tax the compensation paid to Federal employees (*see,* L 1939, ch. 619; codified as Tax Law § 359[6] and later repealed by L 1987, ch 267). For the first time in 1966, the City adopted a personal income tax containing an identical exemption for State and City pensions (*see,* New York City Administrative Code, § T46-112[c][3]; L 1966 ch 773, § 12[c]). In 1981, the State Legislature added a section to both the State and City personal income taxes which exempted from taxation pension benefits of all kinds up to the first $20,000 for any retirees over the age of 59½ (Tax Law § 612[c][3-a]; Administrative Code, § 11-1712[c][3-a]). At the crux of the instant action is the taxation of pension benefits of Federal retirees above this first $20,000, and of the total pension benefits of all Federal retirees under the age of 59½.

Soon after the *Davis* decision, and prior to this action, efforts were made to conform the State and City taxing schemes to *Davis.* On July 21, 1989, the Legislature amended Tax Law § 612(c)(3) and § 11-1712 of the Administrative Code to place pensions paid to Federal retirees in the same position as pensions of State retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989" (L 1989, ch 664, §§ 3; L 1989, ch 664, §§ 1, 2).

The plaintiffs' second amended complaint, served on December 23, 1989, set forth four causes of action. The first alleged a violation of 42 USC § 1983 and sought damages against the defendant Wetzler, the current Commissioner of Taxation and Finance of the State, and various current and former functionaries in the State and

City finance departments. The plaintiffs alleged that in enforcing the impugned Tax Law and Administrative Code, these defendants violated the plaintiffs' right guaranteed under 4 USC § 111 (principles of intergovernmental tax immunity), US Constitution, article VI, § 2, and the due process and equal protection clauses of the United States Constitution. The second cause of action sought a declaration that Tax Law § 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) were unconstitutional. It also sought a refund for the years 1986 through 1989 and asked that those refund rights not be qualified by permitting only prospective application of the decision. In the third cause of action, the plaintiffs sought an injunction against the State and City defendants preventing them from collecting taxes on Federal pensions for the years 1986 through 1989; and to set up a trust fund for repayment of such allegedly unlawfully collected taxes. The fourth cause of action sought a refund from the City for money had and received. The second amended complaint also sought class certification and class attorneys' fees. After service of their answers, the State and City defendants moved for summary judgment on the ground that *Davis* applied prospectively only, since it was completely unforeseeable.

The Supreme Court (Le Vine, J.), *inter alia,* determined that the plaintiffs were entitled to refunds and enjoined the defendants from collecting the taxes as described therein for the period 1986 through 1988 (*Duffy v. Wetzler,* 148 Misc 2d 459). The court reasoned that the *Davis* decision mandated a declaration that "the City and State personal income tax scheme which taxed Federal pension benefits * * * while exempting State and local pension benefits, [was] discriminatory, invalid and unconstitutional" (*Duffy v Wetzler, supra,* at 470). It observed that the 1989 amendments to the Tax Law and the Administrative Code were prospective only. "Thus, Federal Pension benefits received in years prior to 1989 remain[ed] subject to taxation and collection to the extent that the Statute of Limitation applie[d]" (*Duffy v Wetz-*

ler, supra, at 465). The court found that there was no need to determine "whether *Davis* * * * should have prospective or retroactive application, as the question of entitlement, method and extent of a tax refund is governed by New York's Tax Law" (*Duffy v Wetzler, supra,* at 466). It referred to Tax Law § 687(a), which provided, in pertinent part, that a claim for a credit or an overpayment of income tax must be filed within the later of two periods, either three years from the date of filing of the return or two years from the date of payment of the tax. The court in *Duffy* found that although "overpayment" was not defined in the Tax Law, a reference to Federal income tax law, as well as Supreme Court decisions, yielded the concluded "that overpayments arising out of the payment of a tax later held to be unconstitutional are recoverable in the same manner as other overpayments, provided that a timely claim is filed" (*Duffy v Wetzler, supra,* at 466). We disagree.

II

Central to the issue of tax refunds is the prior determination of the prospectivity versus retroactivity question. In our view, the court's opinion that a reference to Tax Law § 687(a) resolves the matter is a non sequitur, ignoring, as it does, the point, argued by the defendants, that there would be no "overpayment" if *Davis* is given prospective effect only. Moreover, none of the Supreme Court decisions cited by the court involved the issue of prospectivity/retroactivity (*see, e.g., Jones v Liberty Glass Co.,* 332 US 524; *Kavanagh v Noble,* 332 US 535). Hence, before a discussion of the proper construction of the term "overpayment" is reached, a determination of the prospectivity/retroactivity problem must be made. Prior to the recent decision of the United States Supreme Court in *Beam* (*supra*), the leading case on this issue was *Chevron Oil Co. v Huson* (404 US 97). In that case, the Supreme Court set forth, in the following language, the criteria for a prospective application of a decision:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity' " (*Chevron Oil Co. v. Huson, supra,* at 106-107).

An ancillary question at bar, therefore, is the extent to which the *Chevron Oil* case is still a valid precedent. For an answer to this, we turn to an analysis of *Beam.*

In *Beam,* the facts were that Georgia State law, prior to its amendment in 1985, had imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held, in *Bacchus Imports, Ltd. v. Dias* (468 US 263), to be violative of the Commerce Clause. Following *Bacchus,* the petitioner, a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law to be similarly inconsistent with the Commerce Clause and sought a refund of $2,400,000 representing the full amount of excise taxes paid for the years 1982, 1983, and 1984. The trial court and the Supreme Court of Georgia held that the pre-1985 version of the statute violated the Commerce Clause but applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the stat-

ute unconstitutional for the years in question. The Georgia Supreme Court Court relied on *Chevron Oil Co. v Huson* (*supra*), and concluded that, but for *Bacchus*, its decision on the constitutional question would have established a new rule of law by overruling past precedent.

The United States Supreme Court reversed and remitted the matter for further proceedings. The decision was, however, by plurality, with one main opinion delivered by Justice Souter (concurred in by Justice Stevens), three separate concurrences, and a dissent. Justice Souter's opinion commenced with the observation that "[s]ince the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, 'a choice * * * between the principle of forward operation and that of relation backward' " (*James B. Beam Distilling Co. v Georgia*, —— US ——, 111 S Ct 2439, 2443, *supra*). Once a rule is found to apply retroactively there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. "Subject to possible constitutional thresholds * * * the remedial inquiry is one governed by state law, at least where the case originates in state court * * * But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise" (*James P. Beam Distilling Co. v Georgia, supra*, at 2443).

As enumerated in *Beam*, there were three ways in which the choice of law problem might be resolved. The first was full retroactivity, applying the decision both to the parties before the court and to all others similarly situated, consistent with res judicata and procedural barriers such as Statutes of Limitation. This practice is "overwhelmingly the norm" but attracted the criticism that "[it] [fails] to take account of reliance on cases subsequently abandoned, a fact of life if not always one of

jurisprudential recognition" (*James B. Beam Distilling Co. v Georgia, supra,* at 2443). The second choice of law resolution was "the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision" (*James B. Beam Distilling Co. v Georgia, supra,* at 2443). This method, however, had the drawback that it tended to relax the force of precedent, by minimizing the costs of overruling and thereby allowing the courts to act with a freedom comparable to that of legislatures. The Justice noted that the court had, "albeit infrequently, restored to pure prospectivity" (*James B. Beam Distilling Co. v. Georgia, supra* [*quoting Chevron Oil Co. v Huson,* 404 US 97]). Finally, the court might utilize "modified or selective, prospectivity," that is, it might apply a new rule to the case in which it was enunciated but return to the old rule with respect to all other cases arising on facts predating the decision (*James B. Beam Distilling Co. v Georgia, supra,* at 2444). The weakness of selective prospectivity was its breach of "the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally" (*James B. Beam Distilling Co. v Georgia, supra,* at 2444). Remarking that *Bacchus* had applied its own rule retroactively, Justice Souter held that it was error to refuse to apply a rule of Federal law retroactively after the case announcing the rule had already done so. He noted that "principles of equality and stare decisis here [prevailed] over any claim based on a *Chevron Oil* analysis" (*James B. Beam Distilling Co. v Georgia, supra,* at 2446).

Justice Souter's opinion did not purport to overrule *Chevron Oil.* He noted that litigants could not be distinguished for choice-of-law purposes on the particular

equities of their claims to prospectivity, that is, whether they actually relied on the old rule and how they would suffer from retroactive application of the new. He added that to that extent, the decision did limit the possible applications of the *Chevron Oil* analysis. "Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2447). The Justice added that once retroactive application had been chosen for any assertedly new rule, it was chosen for all others who might seek its prospective application. "The applicability of rules of law are not to be switched on and off according to individual hardship" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2448). In the final paragraphs of his opinion, Justice Souter noted that the grounds of the Court's decision were narrow, confined entirely to an issue of choice-of-law namely, "[w]hen the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. *We do not speculate as to the bounds or propriety of pure prospectivity*" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2448 [emphasis added]).

Justice White concurred with the retroactivity analysis. However, he departed from the main opinion by supporting *Chevron Oil.* He stated that retroactivity could be utilized either on the theory that the new decision was "reasonably foreseeable" and hence "not a new rule" (thus not implicating *Chevron Oil*) or on the view that the *Chevron Oil* factors would support a retroactive application (*James B. Beam Distilling Co. v Georgia, supra,* at 2448). He, however, perceived "no precedent in civil cases applying a new rule to the parties in the case but not to other similarly situated" (that is, selective or modified prospectivity) (*James B. Beam Distilling Co. v Georgia, supra,* at 2448). The Justice, however, strongly sup-

ported the pure prospectivity theory. He said that "nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court * * * [n]or, *without overruling Chevron Oil and those other cases before and after Chevron Oil,* holding that certain decisions will be applied prospectively only, can anyone sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system * * * *The propriety of prospective application of decision in this Court, in both Constitutional and statutory cases, is settled by our prior decisions*" (*James B. Beam Distilling Co. v Georgia, supra,* at 2448-2449 [emphasis added]). Justice Scalia, with whom Justices Marshall and Blackmun joined, agreed "as an abstract matter" with Justice Souter's reasoning. However, he thought both selective prospectivity and pure prospectivity to be constitutionally impermissible since they infringed on the concept of "the judicial power as understood by our common law tradition" (*James B. Beam Distilling Co. v Georgia, supra,* at 2450). Justice Blackmun, with whom Justices Marshall and Scalia joined, thought "that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function" (*James B. Beam Distilling Co. v Georgia, supra,* at 2450).

The dissent (Justice O'Connor, joined by the Chief Justice and Justice Kennedy) criticized the majority's attempt to sidestep *Chevron Oil,* which "describes our long-established procedure for making this inquiry" (*James B. Beam Distilling Co. v Georgia, supra,* at 2451). Turning to Justice Souter's use of equality and stare decisis, Justice O'Connor observed that neither of these two concepts, without a consideration of *Chevron Oil,* led to the view that once a decision was applied retroactively in the case at issue, it had to be applied retroactively to everyone. As to equality, *Chevron Oil's* purpose was to

determine the equities of the case, and stare decisis cut exactly the other way by "allow[ing] those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them" (*James B. Beam Distilling Co. v Georgia, supra,* at 2452). Justice Scalia concurred by stating that "imposition of retroactive liability on a litigant would *upset that litigant's settled expectations* because the earlier decision for which stare decisis effect is claimed * * * overruled prior law. That would turn the doctrine of stare decisis against the very purpose for which it exists" (*James B. Beam Distilling Co. v Georgia, supra,* at 2452). Utilizing a *Chevron Oil* analysis, Justice O'Connor concluded that the *Bacchus* case should not have been applied retroactively. It established a new rule ("*Bacchus*' rule * * * came out of the blue") (*James B. Beam Distilling Co. v Georgia, supra,* at 2455). And as regards the equities, the Justice stated that "the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate" (*James B. Beam Distilling Co. v Georgia, supra,* at 2455). Finally, Justice O'Connor stated that the court had perverted the meaning of the terms "equality" and "stare decisis" on which it purported to base its retroactivity analysis (*James B. Beam Distilling Co. v Georgia, supra,* at 2450).

It goes without saying that *Beam* is not susceptible to easy explanation and requires the unsalutary procedure, as in all plurality decisions, of a judicial head-count. However, two points appear clear beyond equivocation. First, none of the opinions suggests that *Chevron Oil* has been overruled. Indeed, there appears to be a plurality (Justices White, Stevens, Souter, and the three dissenters) who support pure prospectivity as enunciated in *Chevron Oil*. What separated the two camps was the issue whether

or not it applied in *Beam* itself (Justices Marshall, Blackmun, and Scalia appear hostile to prospectivity in any form). Second, *Beam* is, as Justice Souter noted, a narrow decision, committed only to the removal of the doctrine of modified or selective prospectivity from this area of the doctrine of precedent ("when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity" [*James B. Beam Distilling Co. v. Georgia, supra,* at 2448]).

It is clear, therefore, that *Chevron Oil,* after *Beam,* continues to maintain its precedential vitality. It also bears noting that in two decisions, *Gager v White* (53 NY2d 475, 483-484), and *Matter of Jessica XX* (54 NY2d 417, 424, *affd sub nom. Lehr v Robertson,* 463 US 248), the Court of Appeals adopted a *Chevron Oil* analysis. Thus we do not agree with the proposition that "[t]he continued viability of the *Chevron* test is left in doubt by [*Beam*]" (*see, Kuhn v Colorado,* 817 P2d 101, 110 [Colo]).

III

In a proper case, *Beam* permits, or more precisely, does not proscribe a reference to the *Chevron Oil* criteria in determining whether a decision should have wholly prospective application. We hold that such an approach is mandated on the facts at bar and that the *Davis* decision fits the *Chevron Oil* criteria for prospective application.

Davis "establish[ed] a new principle of law * * * by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron Oil Co. v Huson,* 404 US 97, 100, *supra*). The *Davis* decision was predicated on principles of intergovernmental tax immunity, described as "a most esoteric of constitutional philosophies" (*see, Bohn v Waddell,* 164 Ariz 74, 790 P2d 772, 784, *adhered to on reconsideration,* 167 Ariz 344, 807 P2d 1). Indeed, the path from *McCulloch v Maryland* (4 Wheat 316), the *locus classicus* in this area, to *Davis* has been

anything but a straight line (*see, Davis v Michigan Dept of Treasury,* 489 US 803, 810-815, *supra,* per Kennedy, J. for an historical exposition; *see also, Bohn v Waddell, supra*). Moreover, in *Davis,* Justice Stevens delivered a vigorous dissent based on the idea that "[o]nce one understands the underlying reason for the *McCulloch* holding, it is plain that this tax does not unconstitutionally discriminate against federal employees" (*Davis v Michigan Dept of Treasury, supra,* at 821). In language describing the novelty of this split decision, the Arizona Tax Court (Moroney, J.), in *Bohn v Waddell* (*supra*), observed that "[i]f justices of the United States Supreme Court cannot agree that the right defined in *Davis* was clearly established before *Davis,* it hardly seems appropriate to charge the individual [d]efendants in this case with such perspicacity" (*Bohn v Waddell, supra,* at 784).

Turning to the second criterion, nothing in the instant record demonstrates that retroactive application of *Davis* will either retard or further the doctrine of intergovernmental tax immunity. Since the primary purpose of that doctrine is to protect the Federal government, not private individuals, from being unduly burdened by State taxation (*see,* Senate Rep. No. 112, 76th Cong, 1st Sess 13, to accompany HR 3790), mandatory refunds to the plaintiffs would scarcely remove a threat to the efficient operation of the Federal Government. We also remain unpersuaded by the plaintiffs' contention that retroactive application will deter future enactment of illegal statutes. And as to the third *Chevron* criterion, we hold that the equities preponderate in the State's favor. New York State's taxing scheme, enacted in good faith and presumptively valid, was legitimate and in force for 50 years until a new rule was announced in *Davis.* In our view, the State should not be required to refund an estimated $44,000,000, particularly in today's parlous fiscal circumstances, when neither the State nor the plaintiffs could reasonably have anticipated the invalidation of a longstanding tax provision. In sum, a *Chevron Oil* analysis mandates a pro-

spective application of the instant decision. We would also note consistently with the *Beam* decision, that the *Davis* court never applied its own rule since Michigan "*conceded* that a refund [was] appropriate in these circumstances" (*Davis v. Michigan Dept of Treasury, supra,* at 817) [emphasis added]; *see also, Pledger v. Bosnick,* 306 Ark 45, 811 SW2d 286).

To the extent, therefore, that the Supreme Court's order and judgment in the case at bar awarded refunds and similar relief to the plaintiffs, we now modify that order and judgment by deleting those provisions.

IV

We agree, however, with the other conclusions indicated in the Supreme Court's judgment. First, the court properly denied the application for class action status. "It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis" (*Duffy v Wetzler,* 148 Misc 2d 459, 464, *supra, citing Matter of Crociate v State Tax Commn.,* 133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 726; *Conklin v Town of Southampton,* 141 AD2d 596). Nothing in the record at bar justifies a departure from this rule. Second, the court's rejection of the plaintiffs' claims under 42 U.S.C. § 1983 was correct. We add only the observation that the defense of qualified immunity, which the court did not reach (*see, Duffy v Wetzler,* 148 Misc 2d 459, 469, *supra*), provided a much simpler basis on which to reject the claims. In *Harlow v Fitzgerald* (457 US 800, 818 [emphasis added]), the United States Supreme Court set forth the parameters of qualified immunity, namely, "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have

known" (*see also, Fox v Coughlin*, 893 F2d 475, 477-478; *Neal v Corcoran*, 869 F2d 662, 665, 667-669, *cert denied* 493 US 816; *Walentas v Lipper*, 862 F2d 414, 421-423, *cert denied* 490 US 1021). The claimed right under 4 USC § 111 was not "clearly established" until *Davis*, and so the individual defendants are "shielded from liability for civil damages."

We also agree with the court that, in an action for money had and received, an "appropriate legal protest prior to or at the time of payment [is] a prerequisite to recovery in an action seeking refunds" (*Duffy v Wetzler*, 148 Misc. 2d 459, 469-470, *supra*). The protest requirement was not satisfied at bar. Additionally, the court properly denied the plaintiffs' postjudgment motions seeking variously renewal or reargument of the denial of class certificaiton, permission to add 16 new plaintiffs, intervention by other Federal retirees, and attorneys' fees under the common fund doctrine.

KUNZEMAN, MILLER and O'BRIEN, JJ., concur.

ORDERED that the order and judgment (one paper) of the Supreme Court, Queens County, dated June 14, 1990, is modified by deleting therefrom the provisions which (1) declared that the defendants may not assess and collect personal income taxes on Federal pension benefits received in the years 1986 through 1988 which may be still due and owing, (2) declared that the plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on Federal pension benefits for the years 1986 through 1988, (3) granted the plaintiffs' summary judgment on the third cause of action, and enjoined the defendants from collecting personal income taxes on Federal pension benefits from 1986 through 1988, and (4) enjoined the defendants from interfering with or refusing to grant the plaintiffs a refund of personal income taxes paid on Federal pension benefits from 1986 through 1988; as so modified, the order and judgment is

affirmed insofar as appealed and cross-appealed from, without costs or disbursements; and it is further,

ORDERED that the orders are affirmed insofar as appealed from, without costs or disbursements.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

January 15, 1992

APPENDIX C

SUPREME COURT,
QUEENS COUNTY
IA PART 7

By: LEVINE, J.

Index No. 7706/89

Dated: April 10, 1990

EUGENE H. DUFFY, *et al.*,

— against —

JAMES W. WETZLER, *et al.*

MEMORANDUM

In this action for declaratory, injunctive and monetary relief plaintiffs seek leave to renew and, upon renewal, certification of this action as a class action, and an order granting partial summary judgment on the second cause of action for declaratory judgment. Defendants Shorris, Grayson, Biderman, Crotty and the City of New York cross-move for an order granting summary judgment dismissing the complaint. Codefendants Wetzler, Chu and Regan cross-motive for an order granting summary judgment dismissing the complaint.

This action was commenced as a result of the March 28, 1989 decision of the United States Supreme Court in *Davis v. Michigan Department of Treasury* (489 US —, 109 S Ct. 1500.) The Supreme Court held that Michi-

gan's tax scheme, which exempted from taxation all retirement benefits paid by the State or its political subdivisions, but levied an income tax on retirement benefits paid by all other employers, including the Federal Government violated federal law. The court therein determined that 4 USC § 111 which permits nondiscriminatory state taxation of the compensation of federal employees, applied to the retirement benefits of federal retirees, and that this statute is coextensive with, and must be determined by reference to, the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity. The court therefore found that the Michigan statute violated the principles of intergovernmental tax immunity by favoring retired State and local governmental employees over retired Federal employees. In *Davis* (*supra*), Michigan conceded that under these circumstances a refund was appropriate, and therefore the court determined that Mr. Davis was entitled to a refund. The court, however, made no determination as to whether its decision should be given retroactive effect, and whether the State must provide retrospective relief, such as a tax refund. Mr. Davis' additional claim for prospective relief was left for determination by the State court.

Prior to *Davis* (*supra*), 24 states, including New York, had tax statutes similar to that of Michigan. In New York, pursuant to Article XVI, section 4 of the New York State Constitution pensions paid to officers and employees of the State are exempt from taxation. The pensions of all other employers, including the Federal Government were subject to taxation. In 1981, section 612(c)(3-a) was added to the Tax Law, exempting from income tax the first $20,000 in pension income received by retirees who attained the age of fifty-nine and one-half. Recipients of State and local government pensions, however, remained exempt from taxation pursuant to the State Constitution, and section 612(c)(3) of the Tax Law.

Following *Davis* (*supra*), section 612(c)(3) of the Tax Law was amended to exempt from taxation the pensions of federal employees. (Tax Law § 612[c][3][i], [ii].) This amendment became effective immediately on July 21, 1989 and applied to Federal pension benefits received in taxable years beginning January 1, 1989. Directives issued by the Department of Taxation and Finance provided that any person who may have made a quarterly tax payment during 1989 which was based on a calculation including a tax on a Federal pension would be entitled to a tax credit. The amendment to section 612 (c)(3) of the Tax Law was prospective only, and made no provision for retrospective relief for income taxes paid on Federal pension benefits received prior to January 1, 1989. Section 612(c)(3-a) remains in effect, and is applicable to taxes which were paid or remain due and owing on Federal pension benefits which were received prior to January 1, 1989. The Administrative Code of the City of the New York, section 11-1712(c)(3) was amended in an identical fashion to exempt Federal pension benefits from taxation by the City of New York.

This action was commenced prior to the July 1989 amendments to the State Tax Law and the Administrative Code of the City of New York. A second amended complaint was served in December 1989. Plaintiffs Eugene H. Duffy, James Sweezy and Fernando S. Maura are former employees of the Federal Government and each receive Federal retirement benefits. Coplaintiffs Alice Duffy and Agnes Sweezy are the wives of Eugene Duffy and James Sweezy, respectively, and are named as plaintiffs herein solely as their status as joint tax return filers with their respective husbands. Mr. and Mrs. Duffy previously resided in Suffolk County and are currently residents of Queens County. Mr. Duffy is over the age of 59½ years and filed joint New York State income tax returns for the years 1986 through 1988. Mr. and Mrs. Sweezy are residents of Queens County and filed joint New York City and New York State income tax returns for the

years 1986 through 1988. Mr. Sweezy is also over the age of 59½ years. Mr. Maura is a resident of White Plains, New York, is under the age of 59½ years, and filed New York State income tax returns for 1986 through 1988. Plaintiffs commenced this action, individually and as representatives of all Federal pensioners similarly situated. Defendants James W. Wetzler, the present New York State Commissioner of Taxation and Finance, and former State Commissioner Roderick Chu, and Edward V. Regan, Comptroller of the State of New York (hereinafter "State defendants"), are being sued in their individual and official capacities. Codefendants Anthony Shorris, the present Commissioner of Finance of the City of New York, and former Commissioners Stanley E. Grayson, Abraham Biderman, and Paul Crotty (hereinafter "City defendants") are also being sued in their individual and official capacities. The City of New York is also named as a codefendant.

Plaintiffs assert that section 612(c)(3-a) of the Tax Law which imposes a State income tax on Federal pensions received prior to January 1, 1989, subject to a $20,000 deduction for receipients 59½ years old, is unconstitutional and illegal in light of *Davis* (*supra*). Plaintiffs' first cause of action for damages under 42 USC § 1983 alleges a civil right violation based on the City and State defendants' alleged refusal to recognize and grant plaintiffs' right to a refund of unlawfully collected taxes. It is alleged that the City and State defendants acted in their individual and official capacities, and plaintiffs seek damages "in the amount equal of all monies unlawfully paid to and/or collected" by defendants as New York City and State income taxes on their retirement benefits during the years 1986 to the present. Plaintiffs have made no demand on defendants for a declaration of invalidity and unconstitutionality and allege that this would be useless and futile.

Plaintiffs, in their second cause of action, seek a declaration to the effect that: (i) the taxing scheme imposed

by the State and City of New York prior to 1989 which imposed an income tax on their Federal pension benefits while exempting the pensions of State and local retirees, is invalid and unconstitutional under 4 USC § 111, Article VI, clause 2 of the United States Constitution, the Fourteenth Amendment to the United States Constitution, and principles of intergovernmental tax immunity; (ii) that plaintiffs are entitled to damages in the amount of all income taxes paid or collected from 1986 to the present on such benefits; (iii) that the further collection or enforcement of such income taxes attributable to any tax year prior to 1989 is invalid and unconstitutional; and (iv) refund rights granted to taxpayers for individual income taxes illegally collected may not be qualified by permitting such refunds only prospectively.

The third cause of action seeks injunctive relief against the further collection of the alleged unconstitutional tax imposed on Federal pensions for the years prior to 1989. The fourth cause of action is against defendant City of New York for money had and received.

Plaintiffs now seek leave to renew and, upon renewal, seek an order granting class certification pursuant to CPLR 901 and 902. Plaintiffs further seek an order granting summary judgment on the second cause of action for declaratory judgment. The City defendants and the City of New York, and the State defendants each cross-move for summary judgment dismissing the complaint in its entirety on the grounds that it fails to state a cause of action.

Plaintiffs' request for renewal is granted, as issue has now been joined and, upon renewal, the request for class certification is denied. Plaintiffs' reliance on post *Davis* (*supra*), class action litigation in sister states, as well as their attempts to distinguish *Brady v State of New York* (Supreme Court, Albany County, Prior J, August 23, 1989), and *Crociata v State Tax Commission* (133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 776), are un-

persuasive. It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis. (*Matter of Crociata v State Tax Commission, supra; Conklin v Town of Southampton*, 141 AD2d 596.) Plaintiffs have failed to demonstrate that this case presents an exception to this well established rule. Plaintiffs contend that class action is a superior method of adjudicating this controversy because the governmental entities cannot be trusted with the welfare of these Federal retirees. The court finds this argument unavailing. While the taxing authorities have taken the position that *Davis* (*supra*) does not apply retroactively and therefore does not require a tax refund, plaintiffs' assertion that the defendants will refuse to grant such refunds if so ordered is purely speculative.

Furthermore, while plaintiffs purportedly seek money damages pursuant to 42 USC § 1983, it is clear from the complaint that plaintiffs are in fact seeking a declaratory judgment, injunctive relief and a tax refund. Class action status, therefore, is inappropriate. A class action may not be used to protect members of the proposed class who paid the tax without registering a protest. Generally, a tax voluntarily paid may not be recovered. (*City of Rochester v Chiarella*, 65 NY2d 92, 99; *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 425; *Adrico Realty Corp. v City of New York*, 250 NY2d.) In addition, non-protesting taxpayers may not enhance their tax refund claims through the use of a class action. (*Gandolfi v City of Yonkers, supra.*) Finally, it is clear that a claim for a tax refund is personal to the taxpayer. (*Gandolfi v City of Yonkers, supra*, at 198; *Conklin v Town of Southampton, supra.*) The court therefore, finds that the commencement of this action purportedly on behalf of all similarly situated taxpayers does not constitute an appropriate indication of protest by each proposed

member of the class. *Conklin v Town of Southampton, supra,* at 598-599.)

The *Davis* (*supra*) decision mandates that this court decalre that the City and State personal income tax scheme, which taxed Federal pension benefits, while exempting State and local pension benefits, is discriminatory, unconstitutional and invalid. Contrary to defendants' assertions, the Legislature in enacting section 612(c)(3)(ii) of the Tax Law, and section 11-1712(c)(3) of the Administrative Code did not repeal or annul the former taxing provisions. These amendments are prospective only and exclude from taxation Federal pension benefits received on January 1, 1989 or later. Thus, Federal pension benefits received in years prior to 1989 remain subject to taxation and collection to the extent that the Statute of Limitations applies.

The Supreme Court in *Davis* (*supra*) did not announce whether its decision had retrospective or prospective application. In *Davis* (*supra*) Michigan conceded that the taxpayer was entitled to a refund and therefore the court made no further pronouncements on the issue of a refund. The Supreme Court in citing *Iowa-Des Moines Bank v Bennett* (284 US 239, 247), indicated that to the extent that the taxpayer paid taxes pursuant to an invalid tax scheme, he was entitled to a refund. Defendants, however, in view of this uncertainty argue that this court should apply the test announced in *Chevron Oil Co. v Huson* (404 US 97), and apply *Davis* prospectively only, thereby denying plaintiffs a refund.

The court finds that it need not determine whether *Davis* (*supra*) should have prospective or retroactive application, as the question of entitlement, method and extent of a tax refund is governed by New York's Tax Law. New York has waived its sovereign immunity to the extent provided by section 687(a) of the Tax Law, which provides in pertinent part:

> "Claim for credit or refund of an overpayment of an income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires the later * * *."

The term "overpayment" is not defined in the Tax Law. However, section 607(a) of the Tax Law provides that any term used in the Tax Law is deemed to have the same meaning as when used in a comparable tax of the Federal Income Tax Law. Thus, in construing section 6511 of the Internal Revenue Code, which is comparable to section 687 of the Tax Law, it has been held that overpayments arising out of the payment of a tax later held to be unconstitutional are recoverable in the same manner as other overpayments, provided that a timely claim is filed. (*Jones v Liberty Glass Co.*, 332 US 524, *reh denied* 333 US 850; *Kavenagh v Noble*, 332 US 524, *reh denied* 333 US 850; *Wisconsin National Life Ins. Co. v U.S.*, 42 F2d 316; *cf., City of Rochester v Chiarella*, 65 NY2d 92; *Niagara Mohawk Power Corp. v City School District of the City of Troy*, 59 NY2d 262.)

Defendants assert that a tax refund is not mandated here, as the Court of Appeals has permitted municipalities to retain revenues collected under unconstitutional real property taxes and have given such statutes prospective application only. (*Hurd v City of Buffalo*, 41 AD2d 402, *affd* 34 NY2d 628; *Matter of Slewett and Farber v Board of Assessors of the County of Nassau*, 54 NY2d 547; *Bethlehem Steel v Board of Education*, 61 AD2d 147, *affd* 44 NY2d 836; *Matter of Hellerstein v Assessor of the Town of Islip*, 37 NY2d 1.) This line of cases, however, are clearly distinguishable from the case at bar. Each of these cases involved a challenge to real property tax assessment rolls used by the various localities pursuant to the Real Property Tax Law. The Court of Appeals in *Foss* (*supra*), *Hellerstein* (*supra*), and *Hurd* (*supra*) did not require refunds of improperly or over-assessed

property as this would have required the localities to reassess all of the property in those localities, equalize the assessments, locate the property owners and make the appropriate refunds or demands for the additional payment of taxes. Moreover, these localities depended upon the real property tax assessments to formulate and adopt a budget, and these revenues had already been spent.

In contrast, the case at bar involves the right to a refund of personal income taxes. This court has failed to discover a single reported case in which the courts of this State have refused to refund monies collected pursuant to a provision of the Tax Law or, more specifically, the personal income tax provisions of Article 22, which was later declared unconstitutional. Accordingly, the cases relied upon by defendants fail to provide a basis for a denial of a refund of personal income taxes paid under an unconstitutional taxing scheme. In addition, the obvious and substantial differences between real property taxes and personal income taxes militate against the application of this line of cases to income tax cases. Personal income taxes are paid into the general revenue and defendants do not claim that the State or City relied upon the taxation of Federal pension benefits in the formulation of their respective budgets. While the court is mindful of the current budgetary crisis facing the State and City, it is constrained to declare that if plaintiffs meet the procedural requirements, they are entitled to a refund to the extent they paid taxes on Federal pension benefits which were included in their personal income tax returns for the years 1986 through 1988.

Turning now to defendants' cross motions summary judgment, the request to dismiss the first cause of action for damages pursuant to 42 USC § 1983, is granted. Plaintiffs, in their complaint, allege that the City defendants, in their official and individual capacities, violated plaintiffs' rights under 4 USC § 111 and the Constitution, by subjecting them to a discriminatory tax scheme, and

by refusing to recognize and grant plaintiffs' clearly established right to a refund of the unlawfully collected taxes.

At the outset, the court notes that plaintiffs may not maintain an action for damages against the State of New York, or against the State defendants, in their official capacities, pursuant to 42 USC § 1983. (*Will v Michigan Dept. of State Police,* —— US ——, 109 S Ct 2304.) Municipal entities and their officials, however, may be sued in their official and individual capacities. (*Monell v New York City Dept. of Social Services,* 436 US 658.)

The collection and administration of New York City's personal income tax, as well as refunds of such tax, was taken over by the State of New York in 1975. (Administrative Code of New York City §§ 11-1797[a], 11-1798.) The State Tax Commissioner is charged with the administration and enforcement of the City personal income tax, and all refunds of said tax are paid by the State Comptroller out of a reserve fund established for that purpose. Plaintiffs have failed to establish that the City of New York and the City defendants engaged in any conduct concerning the enforcement of the challenged tax scheme, the collection of taxes, or the right to a refund. The City defendants therefore may not be sued under § 1983 for functions which are performed by State tax officials. Plaintiffs' § 1983 claims against the City defendants and the City of New York are therefore dismissed.

The thrust of plaintiffs' § 1983 claims against the State defendants is that under State law, plaintiffs were required to pay personal income taxes on their Federal pensions benefits from 1986 through 1988. Plaintiffs allege that the State law violated 4 USC § 111 and the doctrine of intergovernmental tax immunity and that this should have been clear to the State defendants prior to *Davis.* Plaintiffs further assert that following *Davis,* the State defendants failed to grant plaintiffs a refund of those taxes. Plaintiffs, however, have failed to establish that

they paid the taxes in question due to any personal action taken against them by the State defendants. Rather, the taxes paid by plaintiffs were imposed by State law, and defendants Wetzler, Chu and Regan were not personally involved in the collection and assessment of plaintiffs' State personal income taxes. There has been no showing that any of the State defendants personally engaged in any activity in connection with the taxation of Federal pensions so as to give rise to a § 1983 claim. The fact that these defendants were or are in a high position of authority is an insufficient basis for the imposition of personal liability. (*McKinnon v Patterson*, 568 F2d 930, 934; *see generally, City of Canton, Ohio v Harris*, —— US ——, 109 S Ct 1197.)

In addition, the court notes that defendant Chu left the office of Commissioner of the Department of Taxation and Finance approximately nine months prior to the *Davis* decision. Thus, it is clear that defendant Chu was not involved in any decision regarding post *Davis* refunds. As this court has previously stated, *Davis* did not establish a clear right to retrospective relief, such as a tax refund. Moreover, in the absence of a refund demand by plaintiffs prior to the commencement of this action, no such refund could be certified by defendant Wetzler or issued by defendant Regan. Therefore, in the absence of a factual showing that the State defendants acting under color of State law participated individually in a civil rights violation, plaintiffs' § 1983 claim must be dismissed. (*Al-Jundi v Estate of Rockefeller*, 885 F2d 1060; *Williams v Smith*, 781 F2d 319, 323-324; *Taylor v. Mayone*, 636 F2d 247.) In view of the foregoing this court need not reach plaintiffs' claims of due process and equal protection, or defendants' defenses of exhaustion of administrative remedies and qualified immunity.

That branch of defendants' cross motions which seek to dismiss plaintiffs' third cause of action for injunctive relief is denied. Contrary to defendants' assertions, this

caus of action is not moot, as New York's taxing scheme which taxes Federal pension benefits reveived prior to January 1, 1989 has not been annulled or repealed. In view of the fact that this court has declared this tax scheme to be invalid and unconstitutional, and has declared that plaintiffs may seek a refund of taxes paid on Federal pension benefits from 1986 through 1988, reverse summary judgment granting injunction relief is appropriate. The State defendants are therefore enjoined from assessing and collecting personal income taxes on Federal pension benefits which may be due and owing for the years 1986 through 1988, and are further enjoined from interfering with plaintiffs' right to file for a refund of personal income taxes paid on Federal benefits for the years 1986 through 1988.

Finally, that branch of defendant City of New York cross motion to dismiss plaintiffs' fourth cause of action for money had and received is granted. An action for money had and received may be used to recover taxes which have been collected in violation of constitutional authority. (*Matter of Trezec v City of New York,* 66 NY2d 807.) However, it is incumbent upon the taxpayer to establish appropriate legal protest prior to or at the time of payment as a prerequisite to recovery in an action seeking refunds. (*See, City of Rochester v Chiarella,* 58 NY2d 316; *Zuckerman v City of New York,* 49 NY2d 415; *Angeline v City of Rochester,* 72 AD2d 445, *affd* 52 NY2d 982; *Bethlehem Steel Corp. v Board of Educ.,* 61 AD2d 147, *affd* 44 NY2d 831.) While the commencement of a declaratory judgment action to challenge an assessment under a tax statute may constitute sufficient protest, ordinarily protest must be made at the time of payment for each year in which recovery is sought. (*See, City of Rochester v Chiarella, supra; Riverdale Country School v. City of New York,* 13 AD2d 103, *affd* 11 NY2d 741.) This requirement is also satisfied when the pendency of either a declaratory judgment action or other legal proceeding challenging the assessment is

still pending at the time of payment in each year in which recovery is sought. (*Corporate Properties Investors v Board of Assessors of the County of Nassau*, —— AD2d ——, 545 NYS2d 166, 170.) In the case at bar, plaintiffs have failed to establish compliance with the protest requirement. No protest was made by plaintiffs at the time they paid personal income taxes on Federal pension benefits received in the years 1983 through 1988. Furthermore, the within action was not commenced until May 8, 1989 which was after plaintiffs paid personal income taxes due on April 17, 1989, for Federal pension benefits received in 1988. Therefore, no action was pending at the time of payment for the years in which recovery is now sought.

In view of the foregoing, plaintiffs' motion for renewal is granted, and upon renewal, the request for class certification is denied. That branch of plaintiffs' motion which seeks partial summary judgment on the second cause of action for declaratory judgment is granted, and it is the declaration of this court that:

(1) The City and State personal income tax scheme which taxed Federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis* (*supra*);

(2) The City and State defendants therefore may not assess and collect personal income taxes on Federal pension benefits received in the years 1986 through 1988, which may be still due and owing;

(3) Plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on Federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the Tax Law.

The City defendants' and the City of New York's cross motion to dismiss the complaint is granted as to the first

and fourth causes of action, and is denied as to the third cause of action. The State defendants' cross motion to dismiss the complaint is also granted as to the first cause of action and is denied as to the third cause of action. Reverse summary judgment in favor of the plaintiffs is granted on the third cause of action, and the City and State defendants are enjoined from assessing and collecting personal income taxes on Federal pension benefits for the years 1986 through 1988, which may still be due and owing. Defendants are further enjoined from interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on Federal pension benefits for the years 1986 through 1988, provided that plaintiffs meet all the procedural requirements for a refund under the Tax Law. Finally, defendants' requests for sanctions is denied.

Settle order.

_____

J.S.C.

APPENDIX D

At an IAS Part 7 of the Supreme Court, State of New York, County of Queens, at the Queens County Courthouse, 120-55 Queens Boulevard, Kew Gardens, New York, on the 14th day of June, 1990.

PRESENT: HON. ALAN LEVINE, Justice.

Index No. 7706/89

EUGENE H. DUFFY, ALICE G. DUFFY, JAMES SWEEZY, AGNES SWEEZY and FERNANDO S. MAURA, on behalf of themselves and all residents of the State of New York who were paid retirement benefits by the United States Government and who paid and/or are subject to New York State and/or New York City Income Taxes thereon in any one or all of the years during the period 1986 through the present, similarly situated,

Plaintiffs,

-against-

JAMES W. WETZLER and RODERICK G.W. CHU, individually and as present or former NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, EDWARD V. REGAN, individually and as COMPTROLLER OF THE STATE OF NEW YORK, ANTHONY SHORRIS, STANLEY G. GRAYSON, ABRAHAM BIDERMAN and PAUL CROTTY, individually and as present or former COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants.

ORDER AND JUDGMENT

The plaintiffs having commenced this action for declaratory, injunctive and monetary relief challenging the validity and constitutionality of New York Tax Law § 612(c)(3) and Administrative Code of the City of New York § 11-1712(c)(3) in imposing personal income tax on certain pension income of retired federal employees who attained the age of fifty-nine and one-half, while the pension benefits of state and local government retirees remain exempt from taxation pursuant to the State Constitution, and the plaintiffs having moved for partial summary judgment for declaratory relief pursuant to CPLR 3212(e) and 42 U.S.C. § 1983, and for renewal of their prior motion for class certification pursuant to Article 9, CPLR, and the defendants having cross-moved for summary judgment dismissing the complaint and for sanctions;

NOW, upon reading and filing the copy of the second amended summons and the copy of the verified complaint verified December 13, 1989; the verified answer of defendants Shorris, Grayson, Biderman, Crotty and the City of New York to the second amended complaint verified January 9, 1990; the verified answer of defendants Wetzler, Chu and Regan to the second verified complaint verified January 5, 1990; the notice of motion of plaintiffs dated January 10, 1990, seeking an order and judgment granting partial summary judgment to plaintiffs, granting leave to renew their motion for class certification and, upon renewal, certifying this action as a class action; the affirmation of John J. Phelan, III, dated January 10, 1990, in support thereof; the affirmation of Michael F. Fitzgerald, dated January 10, 1990, in support thereof and the exhibits and documents annexed thereto; and the copy of the affidavit of Howard J. Sample, sworn to June 13, 1989, in support thereof; the notice of cross-motion dated January 17, 1990, by defendants Wetzler, Chu and Regan seeking an order and judgment summary judgment dismissing the complaint herein and imposing

sanctions against plaintiffs; the affirmation of August L. Fietkau, dated January 17, 1990, in support of the cross-motion and in opposition to the plaintiffs' motion; the affidavit of Roderick G.W. Chu, sworn to January 12, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion; the affidavit of William F. Collins, sworn to January 12, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion; the affirmation of George H. Weissman, dated January 16, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion and the exhibits and documents annexed thereto; the notice of cross-motion dated January 17, 1990 by defendants Shorris, Grayson, Biderman, Crotty and the City of New York seeking an order and judgment granting summary judgment dismissing the complaint and imposing sanctions; and the affirmation of Frances J. Henn dated January 17, 1990, in opposition to plaintiffs' motions and in support of the cross-motion and the exhibits and documents annexed thereto; the reply affirmation of Michael F. Fitzgerald dated February 7, 1990, in support of plaintiffs' motion and in opposition to the cross-motions; and the affidavit of Walter Hellerstein, sworn to February 5, 1990, in support of plaintiffs' motion and in opposition to the cross-motions and the exhibits and documents annexed thereto; the reply affirmation of August L. Fietkau, dated February 14, 1990, in opposition to the plaintiffs' motion and in support of the cross-motions, and the exhibit annexed thereto; the reply affirmations of Eugene O. Duffy, affirmed February 5, 1990 and February 6, 1990, and the exhibits and documents annexed thereto; the affidavit of plaintiff, Eugene H. Duffy, sworn to February 19, 1990 in support of plaintiffs' motions and in opposition to the cross-motions; the sur-reply affirmation of Michael F. Fitzgerald dated February 26, 1990, and the copy of the sur-reply affirmation of Eugene H. Duffy dated February 22, 1990, in support of the plaintiffs' motion and in opposition to the cross-motions;

AND the motion and cross-motions having come on to be heard before the court, and Phelan & Costello (John J. Phelan, Esq., of counsel), having appeared as attorneys for plaintiffs; and Robert Abrams, Attorney General of the State of New York (August L. Fietkau, Assistant Attorney General, of counsel), having appeared as attorney for defendants Wetzler, Chu and Regan, and Victor Kovner, New York City Corporation Counsel (Frances Henn, Assistant Corporation Counsel, of counsel), having appeared for defendants Shorris, Grayson, Biderman, Crotty and City of New York; and the motion and cross-motions having been submitted at such time; and due consideration having been had thereon and the Court having rendered a memorandum decision dated April 10, 1990;

NOW, on motion of Robert Abrams, Attorney General of the State of New York, attorney for defendants Wetzler, Chu and Regan, and of Victor Kovner, New York City Corporation Counsel, attorney for defendants Shorris, Grayson, Biderman, Crotty and City of New York, it is hereby

ORDERED AND ADJUDGED that that portion of plaintiffs' motion which seeks renewal of their prior application for class certification is granted, and upon renewal, the request for class certification is denied; and it is further

ORDERED, ADJUDGED AND DECREED that the City defendants and the City of New York's cross-motion for summary judgment dismissing the complaint is granted as to the first cause of action, under 42 U.S.C. § 1983, and the fourth cause of action, for monies had and received, and is denied as to the third cause of action, for injunctive relief; and it further

ORDERED, ADJUDGED AND DECREED that the State defendants' cross-motion for summary judgment dismissing the complaint is also granted as to the first cause of action, under 42 U.S.C. § 1983, and is denied

as to the third cause of action, for injunctive relief; and it is further

ORDERED, ADJUDGED AND DECREED that that branch of the defendants' cross-motions for sanctions is denied; and it is further

ORDERED, ADJUDGED AND DECREED that that branch of plaintiffs' motion which seeks partial summary judgment on the second cause of action for declaratory judgment is granted, and it is the declaration of this court that:

> (1) the City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation state and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis v. Michigan Department of Treasury*, 489 U.S. ——, 109 S. Ct. 1500 (1990); and
>
> (2) the City and State defendants therefore may not assess and collect personal income taxes on federal pension benefits received in the years 1986 through 1988, which may be still due and owing; and
>
> (3) plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the tax law;

and it is further

ORDERED, ADJUDGED AND DECREED that summary judgment in favor of the plaintiffs is granted on the third cause of action, for injunctive relief, and the City and State defendants are enjoined from assessing and collecting personal income taxes on federal pension benefits for the years 1986 through 1988, which may still be due and owing; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants are enjoined from interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on federal pension benefits for the years 1986 through 1988, provided that plaintiffs meet all the procedural requirements for, and establish entitlement to, a refund under the tax law.

ENTER

/s/ AZ
J.S.C.
John J. Durante
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 92-521

EUGENE H. DUFFY, *et al.*,
Petitioners

v.

JAMES W. WETZLER, *et al.*

On Writ of Certiorari to Appellate Division
Supreme Court of New York,
Second Judicial Department.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Second Judicial Department, for further consideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. —— (1993).

IT IS FURTHER ORDERED that the petitioners Eugene H. Duffy, et al. recover from James W. Wetzler, et al. Three Hundred Dollars ($300.00) for their costs herein expended.

June 28, 1993

Clerk's costs: $300.00

APPENDIX F

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September 1994

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding*

2-10 Mo. No. 1103

EUGENE H. DUFFY, *et al.*,
Appellants,
v.
JAMES W. WETZLER, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic, leaving the Appellate Division order of August 8, 1994 containing a partial injunction operative.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX G

EXCERPTS OF RELEVANT NEW YORK LAW

§ 607. Meaning of Terms

(a) General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

§ 687. Limitations on Credit or Refund

(a) General.—Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return unless such claim is for a credit or a portion thereof pursuant to subsection (e) of section six hundred six of this chapter. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the

two years immediately preceding the filing of the claim unless such claim is for a credit or a portion thereof provided pursuant to subsection (e) of section six hundred six of this chapter. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

PRE-1989 DISCRIMINATORY SCHEME

The N.Y.S. Tax Law 612(c)(3) provides as follows:

> (c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
>
> (3) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes;

N.Y. Tax Law § 612(c)(3) (McKinney 1987 & Supp. 1990)*

The New York City Administrative Code § 11-1712(c)(3) provides as follows:

> (c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
>
> (3) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includable in gross income for federal income tax purposes;

New York, N.Y., Administrative Code § 11-1712(c)(3) (1986 & Supp. 1990).*

---

* On July 21, 1989, the Legislature of the State of New York amended N.Y. Tax Law 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) by removing the unconstitutional pro-

§ 901. Prerequisites to a class action.

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interest of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

* * * *

§ 5514. Extension of time to take appeal or to move for permission to appeal.

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

* * * *

---

vision that discriminated against federal retirees. The amendments apply to federal pension income received in taxable years beginning January 1, 1989.

§ 5601. Appeals to the court of appeals as of right.

* * * *

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; . . .

* * * *

§ 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, . . .

* * * *

APPENDIX H

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of April A.D. 1992.

Present, HON. SOL WACHTLER, Chief Judge, presiding

Mo. No. 376 SSD 31

EUGENE H. DUFFY, *et al.*,
Appellants,

ALBERT ENGEL, *et al.*,
Proposed Intervenors-Appellants,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

The appellants and proposed intervenors-appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal from so much of the Appellate Division order as affirmed Supreme Court's orders denying plaintiffs' post-judgment motions to renew or reargue the denial of class certification, for permission to add intervenors, and to supplement plaintiffs' pleadings, be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that that portion of

the order appealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

Judge Simons took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX I

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of July A.D. 1992.

Present, HON. SOL WACHTLER, Chief Judge, presiding.

2-14 Mo. No. 570

EUGENE H. DUFFY, *et al.*,
Appellants,

ALBERT ENGEL, *et al.*,
Proposed Intervenors-Appellants,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants and proposed intervenors-appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal from so much of the Appellate Division order as affirmed Supreme Court's order denying plaintiffs' post-judgment motion to renew or reargue the denial of class certification be and the same hereby is dismissed upon the ground that that portion of the order sought to be ap-

pealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

/s/ Stuart M. Cohen
STUART M. COHEN
Deputy Clerk of the Court

APPENDIX J

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

90-07800

EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER ON MOTION

Motion by Anderson Kill Olick & Oshinsky, P.C., the co-counsel of the plaintiffs, to enjoin the defendants from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phenan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, from otherwise breaching the fiduciary duties they

hold as trustees of a constructive trust of the common fund in this action, and for related relief, pending reconsideration by this court, upon remittitur from the Supreme Court of the United States, of appeals and cross appeals from an order and judgment of the Supreme Court, Queens County, entered June 26, 1990, and an order of the same court, dated October 1, 1990.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is held in abeyance, pending oral argument with respect thereto; and it is further,

ORDERED that oral argument of the motion shall be held on Wednesday, September 14, 1994, at 12 noon; and it is further,

ORDERED that pending hearing and determination of the motion, the defendants are enjoined from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phenan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund in this action.

MANGANO, P.J., THOMPSON, MILLER, O'BRIEN and ALTMAN, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX K

COURT OF APPEALS
STATE OF NEW YORK

Queens County Clerk's Index No. 7706/89

Appellate Division Second Dept.
Case Nos: 90-07800, 91-02056

EUGENE H. DUFFY, ALICE G. DUFFY, JAMES SWEEZY, AGNES SWEEZY and FERNANDO S. MAURA, on behalf of themselves and all residents of the State of New York who were paid retirement benefits by the United States Government and who paid and/or are subject to New York State and/or New York City Income Taxes thereon in any one or all of the years during the period 1986 through the present, similarly situated,

Plaintiffs-Appellants,

-against-

JAMES W. WETZLER and RODERICK G.W. CHU, individually and as present or former NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, EDWARD V. REGAN, individually and as COMPTROLLER OF THE STATE OF NEW YORK, ANTHONY SHORRIS, STANLEY E. GRAYSON, ABRAHAM BIDERMAN and PAUL CROTTY, individually and as present or former COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants-Respondents.

ORDER TO SHOW CAUSE

Upon the accompanying affidavit of John J. Phelan, III, Esq. dated the 15th day of August, 1994, upon the Orders and Decisions of the Appellate Division, Second Department dated August 8, 1994, and upon all other papers and proceedings, including the in-Chambers hearing held before me at Court of Appeals Hall at 2 p.m., August 17, 1994, it is

ORDERED that defendants and each of them Show Cause at this Court, to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York on the 29th day of August, 1994, why an order should not be entered by the New York State Court of Appeals enjoining and prohibiting the defendants and each of them and their agents, attorneys and employees (i) from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payment, (ii) from distributing to plaintiffs and members of the putative class amounts greater than eighty per cent (80%) of their respective claim for refunds for taxes illegally assessed on federal pensions, including interest thereon, (iii) from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phelan & Costello, P.C. and O'Neil, Cannon & Hollman, S.C. on the proceeds of such refunds and interest, (iv) from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund claimed in this action and (v) for such other and further relief which as to this Court seems just and proper; and it is further

ORDERED, that pending the hearing and determination of enforcement or implementation of the August 8, 1994 Appellate Division order sought to be appealed from be stayed, including that this motion, defendants and each of them and their agents, attorneys and employees be and hereby are temporarily enjoined and prohibited from: taking any unilateral actions, including the mail-

ing or distribution of any refund checks that are the subject of these proceedings or actions that affect or might affect the rights and interests of movants and other potentially affected parties or participants, as part of any unilateral plan, resolution or satisfaction of this long-running, still-pending, complex public tax dispute, without express and particularized Court approval, pending the en banc Court of Appeals' consideration and decision at its next regularly scheduled Session in Albany, New York, commencing Monday August 29, 1994, in conjunction with the Court's consideration and decision of the also pending motion in this case for leave to appeal, also returnable on that date; it is also ordered that the parties maintain the present status quo between them for this additional short period of time inasmuch as this matter has been controverted and pending since 1989 and is before the Courts of this State for implementation by the State courts on a direct Mandate and Order of the United States Supreme Court;

And, SUFFICIENT CAUSE appearing therefore, let service of a copy of this Order by personal service upon the offices of the Attorney General of the State of New York and the Corporation Counsel of the City of New York on or before the close of business, 5 PM, today August 18, 1994, be deemed sufficient; and all other written submissions including on the motion for leave to appeal be served and filed on or before August 24, 1994.

ENTER:

/s/ Joseph W. Bellacosa
Judge
Court of Appeals
Albany, New York

August 18, 1994—1 pm

APPENDIX L

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

September 1, 1994

Mr. Mark Weyman
Anderson Kill Olick & Oshinsky
666 Third Avenue
New York, NY 10017

Re: Eugene H. Duffy, et. al.,
v. James Wetzler, et. al.,
Application No. A-157

Dear Mr. Weyman:

The application for a stay pending the filing and disposition of a petition for certiorari in the above-entitled case has been presented to Justice Thomas, who on September 1, 1994 endorsed thereon the following:

"Deny
CT
9/1/94"

Sincerely,
WILLIAM K. SUTER
Clerk

By /s/ Cynthia Rapp
CYNTHIA RAPP
Assistant Clerk

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

September 14, 1994

WILLIAM K. SUTER
Clerk of the Court

Robert Costello
Phelan & Costello, P.C.
665 5th Avenue, 9th Floor
New York, NY 10022

Re: Eugene H. Duffy, et al. v. James Wetzler, et al.
No. 94-157

Dear Mr. Costello:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Souter and referred to the Court is denied. Justice Breyer took no part in the consideration or decision of this application."

Very truly yours,

WILLIAM K. SUTER
Clerk

By /s/ Francis J. Lorson
FRANCIS J. LORSON
Chief Deputy Clerk

cc: Denise Hartman
Clerk, Court of Appeals of New York
(Your No. 1103)